83-905

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DON RICHARD STAINS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS FOURTEENTH SUPREME JUDICIAL DISTRICT

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QUESTION PRESENTED

WHETHER A SEARCH-WARRANT AFFIDAVIT IS SUFFICIENT IF IT CONTAINS ONLY (1) A STATEMENT THAT THE AFFIANT "HAS REASON TO BELIEVE AND DOES BELIEVE" THAT SPECIFICALLY DESCRIBED PROPERTY IS AT A CERTAIN LOCATION, AND (2) A RELIABLE, DETAILED ACCOUNT OF THE OFFENSE WHICH DOES NOT MENTION THE PROPERTY.

CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record, certifies that the following listed persons and government entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

DON RICHARD STAINS ..... *Petitioner*

THE STATE OF TEXAS ..... *Respondent*

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To The Honorable Chief Justice Of The United States And The Associate Judges Of The United States Supreme Court:

Petitioner DON RICHARD STAINS prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Texas, Fourteenth Supreme Judicial District, entered in the above-entitled cause on October 6, 1983.

OPINION BELOW

The opinion of the Court of Appeals of Texas, Fourteenth Supreme Judicial District has not been reported at the printing of this petition. The opinion appears in

"Appendix A." *Stains v. State*, ____S.W.2d____, No. C14-81-600-CR (Tex. App.—Houston [14th], April 20, 1983). The Petition for Discretionary Review in the Texas Court of Criminal Appeals was denied without a written opinion (Cause Number 045-83, Texas Court of Criminal Appeals, September 21, 1983).

JURISDICTION

The opinion of the Texas Court of Appeals, Fourteenth Supreme Judicial District was filed April 20, 1983, and appears in "Appendix A," *infra*. A timely Petition for Discretionary Review to the Texas Court of Criminal Appeals was filed, being refused without written opinion September 21, 1983. Therefore, the date of entry of final judgment of the Texas Court of Appeals is October 6, 1983. TEX. CODE CRIM. PROC. ANN. art. 42.04a(b)(2) (Vernon Supp. 1983) (establishing the date of finality of the judgment of the Court of Appeals to be fifteen [15] days from refusal of the Petition for Discretionary Review).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1966 & Supp. 1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth and Fourteenth Amendments to the United States Constitution appear in "Appendix C," *infra*.

STATEMENT OF THE CASE

Petitioner was charged in each of three indictments with Rape of a Child. TEX. PENAL CODE ANN. § 21.09

(Vernon Supp. 1982).[1] A jury found him guilty of that offense in each case after a consolidated trial. Punishment was set by the jury[2] at three years confinement in the Texas Department of Corrections.

Prior to trial, Petitioner filed a "Motion to Suppress and Return Evidence Obtained by Unlawful Search and Seizure," including "returned cancelled checks payable to the complainants." Those checks were seized from Petitioner's residence pursuant to a search warrant, the validity of which is the subject matter of this Petition. The court overruled the motion to the extent that three checks were allowed in evidence at trial, over objection. The trial court specifically found "no constitutional, statutory legal rights [sic] of the defendant were violated" (R. IV-131), in the face of Petitioner's contention, *inter alia*, that the affidavit in support of the search warrant "detailed only hearsay information with no showing of underlying circumstances reliable enough to support the allegation that affiant's information was correct."[3]

In summary, the testimony at trial (which is recited in more detail in "Appendix D," *infra*) reflected that Petitioner had hired the complainants as photographic models for a karate magazine. In connection with the modeling, testimony reflected that the complainants were paid by

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1. The indictments alternatively charged the offense of Rape. TEX. PENAL CODE ANN. § 21.02 (Vernon 1974 & Supp. 1982), which portion of the indictment in each case was abandoned by the prosecution.

2. In Texas, the accused may elect jury determination of punishment. TEX. C. CRIM. P. ANN. art. 37.07 (Vernon 1981).

3. The State also took the position that the search was allowed based upon consent. The trial judge, however, found that consent was not voluntarily given.

Petitioner. The method of payment included the three checks which were admitted in evidence over objection. Petitioner did not testify, although he presented evidence which contradicted some of the testimony of the complainants and evidence substantiating the legitimacy of his photography endeavors.

On direct appeal, the Texas Court of Appeals, Fourteenth Supreme Judicial District, affirmed, reaching the merits of the contention raised. Neither the State of Texas nor the Court of Appeals suggested that the issue had not been properly raised or that the admission of the evidence in question was harmless.

The Texas Court of Criminal Appeals, without written opinion, declined discretionary review of the case.

ARGUMENT

The affidavit supporting the issuance of the search warrant ("Appendix B," *infra*) states, with respect to the existence and location of the checks in question, that the affiant had reason to believe and did believe that they were at the described location. However, the recitation by the affiant is totally devoid of any assertion of the basis of his knowledge that checks were written or that they were located as stated. The opinion of the Texas Court of Appeals, written prior to the decision in *Illinois v. Gates*, ____U.S.____, 103 S.Ct. 2317 (June 8, 1983), responded to Petitioner's complaint as follows:

> Initially, appellant [Petitioner] contends that the affidavit does not contain the requisite "underlying circumstances" which form the informant's conclusion that certain objects were present at the named location. Specifically, appellant urges that the in-

formation supplied by the complainants does not support the affiant's conclusion that the checks were located at appellant's residence, and would be evidence or instrumentalities of the offense, citing *Aguilar v. Texas*, 378 U.S. 108 (1964). This so-called "prong" of *Aguilar* is satisfied when an affidavit states facts and circumstances from which a reasonable person could conclude that the items to be seized are where the affidavit claims them to be and that the items are of a criminal nature such that the law authorizes their seizure. *Winkles v. State*, 634 S.W.2d 289 (Tex. Crim. App. 1982, *opinion on motion for rehearing*). The affiant in the instant case states that the checks payable to the complainants are located at the premises in question and that the checks constitute evidence of an offense. We find the facts sufficient to support the seizure of the checks. The affidavit contains information gathered from the complainants, detailing appellant's pattern of conduct with the three complainants, including allegations that the girls had "modeled" for appellant and had worked as babysitters with appellant's children. The checks show a connection between appellant and the complainants. Even though the affidavit does not contain information *from the complainants* indicating that the checks were to be found in the place to be searched, this missing information does not vitiate the determination that probable cause existed to search the premises. *Lopez v. State*, 535 S.W.2d 643 (Tex. Crim. App. 1976). The instant affidavit contains sufficient facts and circumstances to support the issuance of the warrant; only a probability, not a prima facie showing of criminal activity, need be shown. *Winkles*, 634 S.W.2d at 297.

First, it should be noted that the opinion is misleading if construed to mean that the checks were seized incidental

to a search of the premises for other items.[4] Indeed, the record indicates a specific search for the checks (*See* R. II-34-43, IV-126).[5] The cases upon which the Texas Court of Appeals relied are each opinions of the Texas Court of Criminal Appeals construing *United States v. Ventresca*, 379 U.S. 89 (1965). *Winkles v. State*, 634 S.W.2d 289, 298 (Tex. Crim. App. 1981); *Lopez v. State*, 535 S.W. 2d 643, 647 (Tex. Crim. App. 1976).

Decided after the opinion of the Texas Court of Appeals in the case at bar and most pertinent to the issue presented, *Illinois v. Gates, supra*, provides a foundation for analysis.[6] After abandoning the "two-pronged test" of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), and after "reaffirming" the totality of the circumstances test from *Jones v. United States*, 362 U.S. 257 (1960), *United States v. Ventresca, supra*, and *Brineger v. United States*, 338 U.S. 160 (1949), the majority in *Gates* articulates unacceptable situations:

> Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant.

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4. Nor does *Lopez v. State*, 535 S.W.2d 643 (Tex. Crim. App. 1976), in any way address the extent to which items can be seized when discovered incidental to a properly obtained warrant.

5. Petitioner concedes that the checks could have been seized if they had been seen in plain view during the process of searching for other objects of the search warrant for which probable cause existed. *E.g., Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931), *United States v. Lefkowitz*, 285 U.S. 452 (1931), *Steele v. United States*, 267 U.S. 498 (1925). However, that was not the case.

6. Also, presently pending before this Court is *Massachusetts v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted* ____U.S.____, 103 S.Ct. 3534 (June 27, 1983), the outcome of which could be dispositive of the case at bar.

> A sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do. *Nathanson v. United States,* 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). As in *Nathanson,* this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. But when we move beyond the "bare bones" affidavits present in cases such as *Nathanson* and *Aguilar,* this area simply does not lend itself to a prescribed set of rules, like that which had developed from *Spinelli.* Instead, the flexible, common-sense standard articulated in *Jones, Ventresca,* and *Brinegar* better serves the purposes of the Fourth Amendment's probable cause requirement.
>
> ____ U.S. at ____, 103 S.Ct. at 2232-33.

The question in the case at bar is whether the magistrate's conclusion of probable cause *with respect to the checks* was grounded upon the "bare conclusions of others." A reading of the affidavit reveals that it was.

The affidavit ("Appendix B," *infra*) summarily asserts that, located at the pertinent residence, was evidence tending to show that Petitioner committed an offense, namely, "checks made payable to Tammy Marie Williams, Sarah Leota Hanson and Tracie Ann Gonzales." However, the portion of the affidavit setting forth the basis of the affiant's belief that such "evidence" was so located states only that complainant Tammy Marie Williams told the affiants that she "modeled" for Petitioner, along with a description of the alleged sexual acts. Nowhere is there any suggestion that Petitioner wrote a check to her, or that he paid her at all. The identical situation exists with reference to complainant Sarah Leota Hanson. With respect to Tracie Ann Gonzales, the affidavit only states that she told Affiant materially identical information to that related by the other two girls, adding only, "the third time [she] *worked* for [Petitioner]." Nothing in the assertion that she "worked" implied employment for remuneration. In sum, the affidavit contains no assertion that the affiant had credible information (1) that any checks were written, (2) that anyone had reason to believe that checks would be in the described location or (3) that checks would in any way provide evidence that Appellant committed an offense.

In *Gates*, the affidavit at least reveals the source of the information as to the existence of contraband. Contrariwise, the affidavit in the case at bar reveals no statement under oath from which the magistrate could conclude—other than by speculation—the basis, if any, of the affiant's bare conclusion.

It cannot be forgotten that the Fourth Amendment specifically requires a finding of probable cause "supported

by oath or affirmation." Therein lies the distinction between the case at bar and *Gates* (as well as those earlier decisions providing foundation for *Gates*). In *Gates,* the affiant told the magistrate—under oath—the source of all of the information providing the basis for his conclusion, including an anonymous letter which initiated the investigation. The determination of probable cause was therefore made by the magistrate. In the case at bar, the determination of probable cause was made by the affiant. His conclusory statement that he had reason to believe and did believe that the checks were at the suggested location did not provide the magistrate with sufficient information regarding the source of the information to allow the magistrate to determine *independently* the constitutional sufficiency of his belief. The question of whether there was "reason to believe" that the described checks could have been found at Petitioner's residence should have been answered by the magistrate, not the affiant who was a deputy sheriff.

The affidavit includes the complainants' somewhat detailed accounts of the alleged offense, describing the activities in question. However, those statements—which do not mention either payment or checks—do nothing to reinforce the affiant-officer's bare conclusion that the described checks existed and would be at Petitioner's residence. A thorough investigation is not the same as probable cause.

CONCLUSION

The facts of this case demonstrate the precise type of invasion into personal affairs which the framers of the Fourth Amendment undertook to prevent. Certiorari

should be granted not only to afford Petitioner his Fourth Amendment rights but to exemplify the limits of *Illinois v. Gates, supra.*

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document, along with Appendices, was mailed to counsel for the respondents herein, Hon. John B. Holmes, Jr., District Attorney of Harris County, 201 Fannin Street, Suite 200, Houston, Texas 77002 and Hon. Jim Maddox, Attorney General of Texas, Supreme Court Building, Capitol Station, Austin, Texas 78711, certified (return receipt requested) with proper postage.

Done this _____ day of _____, 1983.

CLYDE F. DEWITT, III

APPENDIX A

OPINION OF THE TEXAS COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT

C14-81-600-CR

DON RICHARD STAINES, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from the 183rd District Court of Harris County
Cause Nos. 304,969; 304,970 & 304,971
[Consolidated]

This appeal follows appellant's conviction for rape of a child. The grand jury returned three indictments charging appellant with the rape of TMW, SLH and TAG, all females under the age of seventeen. On appellant's motion the cases were consolidated, and Staines entered a plea of not guilty to the charges. A jury found him guilty and assessed punishment at three years confinement in the Texas Department of Corrections. We affirm.

At issue in a sole ground of error is whether the court erred in overruling appellant's motion to suppress evidence. Appellant's residence was searched pursuant to a warrant issued on October 26, 1979. Appellant attacks the validity of the search warrant itself as well as the introduction of certain items seized under the authority of the warrant.

The record contains a search warrant and affidavit made by Detective K. B. Hendricks of the Harris County Sheriff's Department. The affidavit states that Hendricks began an investigation on October 25, 1979, involving the rapes of three children, TMW, SLH and TAG. The incidents were alleged to have occurred from January through October of 1979. The affidavit states that Hendricks spoke with TMW on October 25, 1979, and she stated that she met appellant in December, 1978, "between Christmas and New Years" when she went to appellant's apartment to "model" for Staines. Appellant took her to the bedroom and instructed her to remove her clothing so he could "take her measurements." She complied and appellant recorded her measurements in a "black book." Appellant then had TMW dress in a karate suit and he took photographs of her. The affidavit also reflects that TMW went to appellant's "residence on Blackhawk" from April through October 1979, for more "modeling" sessions, during which TMW again would disrobe, and appellant would record her measurements in his "black book." Appellant would tell TMW he wanted to "check her bone structure" and would subsequently have sexual contact and sexual intercourse with TMW. The affidavit further details similar episodes related by SLH and TAG, which occurred in May through October, 1979, at appellant's "house on Blackhawk." Appellant would have SLH stand before a large camera in the "studio" when she was nude. The affidavit was sworn to and a warrant issued thereon on October 26, 1979. The warrant authorized the search of a residence located at 16623 Blackhawk Boulevard, Friendswood, Harris County, Texas, and commanded the seizure of certain specified items, alleged to be evidence of crime, to wit:

(1) nude photographs of TMW, white female, 13 years of age, SLH, white female, 15 years of age, TAG, white female, 13 years of age and any other photographs of nude children and any undeveloped film;

(2) one black, hard covered book, approximately 6" x 8" x 1" containing the name, age and physical measurements of TMW, SLH and TAG and other children whose names are unknown to your affiant;

(3) checks made payable to TMW, SLH and TAG;

(4) the business records of Don R. Staines, Freelance Photography which may tend to show the connection between Don R. Staines and child pornography including but not limited to phone bills, bank records, invoices and correspondence.

The officers recovered:

(1) black and white and color pictures, processed and unprocessed films of complainants and other unknown persons, clothed and nude.

(2) the described black book having personal information on the complainants and other persons.

(3) returned cancelled checks payable to the complainants.

(4) business records of Don R. Staines:

(a) checks from bank

(b) telephone bills

(c) utility bills

(d) storage space bills/reciepts (sic)

(e) other reciepts (sic) & bills relating to business

(f) phone book records of clients & other persons

(g) journal of clients, detailing personal information

Initially, appellant contends that the affidavit does not contain the requisite "underlying circumstances" which form the informant's conclusion that certain objects were present at the named location. Specifically, appellant urges that the information supplied by the complainants does not support the affiant's conclusion that the checks were located at appellant's residence, and would be evidence or instrumentalities of the offense, citing *Aguilar v. Texas,* 378 U.S. 108 (1964). This so-called "prong" of *Aguilar* is satisfied when an affidavit states facts and circumstances from which a reasonable person could conclude that the items to be seized are where the affidavit claims them to be and that the items are of a criminal nature such that the law authorizes their seizure. *Winkles v. States,* 634 S.W.2d 289 (Tex. Crim. App. 1982, *opinion on motion for rehearing*). The affiant in the instant case states that the checks payable to the complainants are located at the premises in question and that the checks constitute evidence of an offense. We find the facts sufficient to support the seizure of the checks. The affidavit contains information gathered from the complainants, detailing appellant's pattern of conduct with the three complainants, including allegations that the girls had "modeled" for appellant and had worked as babysitters with appellant's children. The checks show a connection between appellant and the complainants. Even though the affidavit does not contain information *from the complainants* indicating that the checks were to be found in the place to be searched, this missing information does not vitiate the determination that probable cause existed to search the premises. *Lopez v. State,* 535 S.W.2d 643 (Tex. Crim. App. 1976). The instant affidavit contains sufficient facts and circumstances to support the issuance of the warrant; only a probability,

not a prima facie showing of criminal activity, need be shown. *Winkles,* 634 S.W.2d at 297.

Likewise, appellant contends that even though the affiant gives a detailed description of the place to be searched, the complainants' assertions in the affidavit only refer to this place as appellant's "residence on Blackhawk." Even though there is no showing how the affiant acquired the minutely detailed description of the premises, we do not find this fatal. All that is required is that the affidavit *or* search warrant describe the premises to be searched with sufficient definiteness to enable the officers executing the warrant to locate the property and distinguish it from other places in the community. *Maxon v. State,* 507 S.W. 2d 234 (Tex. Crim. App. 1974). We know of no rule which requires the *informant or complainant* to give a detailed description of the premises, especially where the premises may be prsonally observed by the affiant himself.

Appellant next complains that the information underlying the affidavit is stale. The affidavit reflects that appellant first met the complainant TMW in December, 1978. The affiant describes appellant's pattern of conduct with TMW from that date until October 8, 1979; the affidavit and warrant are dated October 26, 1979.

The facts attested to in the search warrant affidavit must be so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time by the magistrate. *Lopez,* 535 S.W.2d at 648. In the instant case, the affidavit details an ongoing pattern of criminal conduct, in addition to several specific dates which indicate when the alleged incidents took place. Appellant's complaint is well-founded as to the information from the complainant TAG; that portion of the affi-

davit contains no definite time reference which would indicate when the alleged incidents took place. However, we find this defect to be harmless. Disregarding that portion of the statement, the remainder of the affidavit contains sufficient facts to enable the magistrate to determine that the events were recent enough to support a finding of probable cause at the time the warrant was issued. *Sherlock v. State,* 632 S.W.2d 604 (Tex. Crim. App. 1982). The affiant spoke with the complainants TMW and TAG on October 25, 1979, and with complainant SLH on October 26, 1979. October 8, 1979, is the latest date specified in the affidavit. The eighteen day lapse between this date and the issuance of the warrant was not fatal.

Lastly, appellant takes issue with the seizure of the "black book." Staines contends that the book was exempt from seizure under TEX. CODE CRIM. PRO. ANN. art. 13.02, § 10 (Vernon Supp. 1982-1983) which provides:

> A search warrant may be issued to search for and seize . . . property or items, *except the personal writings by the accused,* constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense. . . . (emphasis added).

Appellant contends that even though the book was never introduced into evidence, the harmful effect is still present because the prosecutor was allowed to hold it up and read from it before the jury. All three complainants testified that Staines had written their measurements and other personal data in the "black book." Appellant did not object to the girls' testimony concerning the book; the court sustained appellant's objection to the state's attempt

to introduce the book into evidence. Appellant never requested an instruction for the jury to disregard any references to the book. We are unable to find support in the statement of facts for appellant's contention that the state was permitted to "read" from the book. Thus the error, if any, does not call for reversal.

Finding no reversible error, we overrule appellant's ground of error and affirm the conviction.

/s/ WILLIAM E. JUNELL
Associate Justice

Judgment Rendered and Opinion filed April 20, 1983.

Panel consists of Associate Justices Junell, Murphy and Sears.

APPENDIX B

THE STATE OF TEXAS §
COUNTY OF HARRIS §

AFFIDAVIT FOR SEARCH WARRANT

I, Detective K. B. Hendricks, a peace officer employed by the Harris County Sheriff's Department and assigned to the Homicide Division do solemnly swear that I have reason to believe and do believe that property and items constituting evidence of an offense and evidence tending to show that a particular person namely, Don R. Staines committed an offense, are currently located within a premises in Friendswood, Harris County, Texas, namely, within the residence of Don R. Staines which is located at 16623 Blackhawk Blvd., Friendswood, Harris County, Texas, more particularly described as a one-story brick residence with two car attached garage, the house facing a southwesterly direction and is the sixth house facing Blackhawk Blvd. when traveling southeast on Blackhawk from Friendswood-Webster Road. This residence has a black mailbox on the right hand side of the driveway as you enter the driveway from Blackhawk. There is a mercury vapor lamp in the front yard located to the left of the front door as you exit this residence. This premises is owned and controlled by said Don R. Staines and his wife Surang Staines. The property and items which are located therein and which constitute evidence of an offense, and which tend to show that a particular person committed an offense are more particularly described as being:

(1) nude photographs of Tammy Marie Williams, white female, 13 years of age, Sarah Leota Hanson, white female, 15 years of age, Tracie Ann Gonzales, white female, 13 years of age and any other photographs of nude children and any undeveloped film;

(2) one black, hard covered bound book, approximately 6″ x 8″ x 1″ containing the name, age and physical measurements of Tamy Marie Williams, Sarah Leota Hanson and Tracie Ann Gonzales and other children whose names are unknown to your affiant;

(3) checks made payable to Tammy Marie Williams, Sarah Leota Hanson and Tracie Ann Gonzales;

(4) the business records of Don R. Staines, Freelance Photography which may tend to show the connection between Don R. Staines and child pornography including but not limited to phone bills, bank records, invoices and correspondence.

My belief aforesaid is based upon the following facts:

On October 25, 1979, your affiant was assigned an investigation involving the rape of three children, namely, Tammy Marie Williams, Sarah Leota Hanson and Tracie Ann Gonzales which occurred in January through October of 1979. During your affiant's investigation he first spoke with Tammy Marie Williams on October 25, 1979, and Miss Williams who is a 13 year old white female residing with her parents at 2810 Greenbriar in Dickenson, Texas, and is an eighth grader at McAdams Jurior High School. She related the following to your affiant: that she first

met Don R. Staines in December of 1978 at the Brentwood Terrace Apartments in Webster, Texas and was asked by Don R. Staines the Defendant, to model for him. Miss Williams stated that between Christmas and New Years 1978 she went to the Defendant's apartment for the first modeling session. She was taken by the Defendant straight back into the bedroom and the door locked. The Defendant told Miss Williams it was necessary for him to take her measurements before the session could begin and he told her to take off all of her clothes, which she did. During the taking of the measurements the Defendant did put his hands against the breast and vagina of Miss Williams. Miss Williams observed the Defendant record the measurements in the above described black book after which the defendant took photographs of Miss Williams after he had her dress in a Karate suit. At the conclusion of this session the Defendant requested Miss Williams to baby-sit with his three children while he and his wife went out. After the Defendant and his wife left the apartment Miss Williams observed three or four bags full of money in the bedroom closet and upon looking closer observed a lot of one hundred and one thousand dollar bills at which time she became scared and quit looking.

Miss Williams related that she next modeled for the Defendant during the first week of January, 1979. The Defendant came and got Miss Williams at her apartment and took her to his apartment, back into the bedroom and again locked the door. The Defendant again instructed Miss Williams to remove her clothes, which she did, he again measured her and recorded the measurements. He next told Miss Williams he needed to "check your bone structure" and told her to sit on the edge of the bed. As

she was sitting on the bed naked, he then unzipped his pants at which time Miss Williams started to stand up but was pushed back down on the bed by the Defendant and told Miss Williams "if you ever tell what goes on outside this room, you will be in trouble". The Defendant then placed his penis in the vagina of Miss Williams.

Miss Williams stated that she modeled for the Defendant in April, 1979, June, 1979, and on each of these occasions the Defendant did record the measurements of Miss Williams in the aforesaid black book and did on each occasion touch the breast and vagina of Miss Williams. Beginning in July of 1979, Miss Williams was taken by the Defendant to his residence on Blackhawk on three or four occasions for modeling sessions. On each occasion the Defendant took Miss Williams into the "studio" room and locked the door. On each occasion the Defendant told Miss Williams to undress at which time he took her measurements, touched her breasts and vagina with his hand.

During August of 1979, Miss Williams stated that she was taken to the Nasa Bay Motor Inn on two occasions, the first time in early August and the second time on August 14, 1979. On each occasion the Defendant did place his hands on her breasts and vagina and on the fourteenth of August placed his thumb in her vagina.

During September of 1979, the Defendant picked Miss Williams up at her school on two occasions and on one occasion at her home. On all three occasions, the Defendant took Miss Williams to his residence on Blackhawk. On all three occasions, the Defendant took Miss Williams into his "studio" room and had her undress, took her measurements, recording them in the black book and

before having her dress again would fondle her breasts and vagina.

In October of 1979, from the first to the eighteenth, the Defendant picked Miss Williams up on three occasions and on each occasion he took her to the Blackhawk address. About October 8, 1979, while at the Blackhawk address, the Defendant had Miss Williams take off her clothes for measuring and while naked had her sit on the edge of the bed and as he approached he unzipped his pants and pulled Miss Williams down on the floor pinning her with his body and attempted to force his penis into her mouth at which time Miss Williams started crying. The Defendant then placed his penis into Miss Williams vagina. The Defendant next instructed Miss Williams "you had better not say anything to anybody about what went on in this room today". Shortly after this, the Defendant left the Blackhawk address to go get his wife leaving Miss Wiliams and Sarah Hanson at the Blackhawk Street address. Miss Williams looked inside the above described black book and observed numerous names including the name George with the age being 16 and George's measurements written beside his name and age.

Your affiant next talked with Sarah Leota Hanson at approximately 3:05 A.M. on October 26, 1979. Miss Hanson is a 15 year old white female residing with her parents at 1606 Pine Grove Drive, Dickenson, Texas and is an eighth grader at McAdams Junior High School. Miss Hanson related the following facts to your affiant; I first met Don R. Staines in May of 1979 and was introduced by Tammy Williams. The first time he picked us up at Tammy's house and took us to an apartment in

Webster. Don R. Staines called me into the bedroom and when I entered he locked the door behind me. He asked me questions about myself including was I a virgin, what size bra I wore, what size panties and he wrote all of these things down in a black book. He then told me to undress and I did. He then took out a measuring tape and measured my bust, stomach, inseam, outseam and my waist recording all of these measurements in a book. While I was still naked he told me to sit in a chair and he was going to check out my bone structure. I sat down and he put his hands on my thigh and worked his hands up to and touched my vagina several times with his fingers and began unzipping his pants. When I saw this I told him I wanted to get dressed and he told me "Sarah don't you tell anyone what happens in here or something might happen". He stepped out of the room and I got dressed and went out into the living room.

About the second week of June in 1979, Don called my house and asked me to model for him. He picked me up at Tammy's house and took us to his house on Blackhawk Street. He took me into the bedroom and locked the door and put a chair under the door knob. He told me he had to measure me and to take my clothes off which I did. As he measured me he touched my breasts and recorded the measurements in his black book. He then told me to sit on the edge of the bed and to spread my legs. He unzipped his pants and knelt down in front of me. He pulled down his pants exposing his erect penis then he grabbed me by my shoulders pushing me down on the bed pinning me against the bed. He then placed his penis into my vagina. After this he told me "if you tell anybody what went on in here today you will get hurt". In August of 1979, the Defendant picked me up

and took Tammy and I to a room at the Nasa Bay Motor Inn. He took Tammy in first and I waited outside. Later, when he called me in he had me undress took my measurements, and wrote it down in his book. He just touched my breasts on this occasion. Around the second or third week of August, he took us back to the Nasa Bay Motor Inn. When he called me in I had to take my bathing suit off and he measured me and wrote the figures in his black book. I was nude throughout the measuring session at the Nasa Bay Motor Inn on both occasions.

On six occasions in September and October, Don R. Staines picked Tammy, Tracie Ann Gonzales and myself up and took us to his residence on Blackhawk. On each of these occasions except the last time, he would take my measurements while I was nude and record them in his black book. The room at the Blackhawk address that he called his studio had a large camera on a tripod with the camera facing the bed where he always had me stand or sit while I was nude. Although I do not know if he took photographs of me while I was nude he always had me standing in front of a large camera in his bedroom.

Your affiant next talked with Tracie Ann Gonzales at approximately 5:00 P.M. October 25, 1979. Miss Gonzales is a 13 year old white female residing with her parents at 2706 Greenbriar, in Dickenson, Texas and is an eighth grader at McAdams Junior High School. Miss Gonzales related the following facts to your affiant; the first time I modeled for Don R. Staines, he took me into a room which he called a "studio" and told me to take my clothes off that he was going to measure me. I took my clothes off except for my panties and laid them on the floor. He measured my arms, chest, waist, hips, thighs

and calves and then asked me numerous questions including my ring size, my bra size including the cup size. I remember him asking my age and I told him I was 13. As I was standing there without any clothes on he told me I needed to do some exercises and made me do these exercises while standing next to the bed without my clothes on. Don then had me lie on the bed on my stomach and he started massaging my back and placed his hand between my legs and put his finger into my vagina. After he got through I got up and got dressed.

The second time I went to model at Don's House was about two weeks later and again I went with Tammy and Sarah. When he called me into the same room, he had me take my clothes off and do the exercises again and then he measured me again. Don next told me to lie on the floor and he was going to give me a massage. I laid down on the floor without my clothes on. He again stuck his thumb in my vagina. He then massaged my shoulders and while on top of me put his penis into my vagina. I told him to stop and he then massaged my breasts.

The third time I worked for Don was about two weeks later. Don took us to the Nasa Bay Motor Inn and I went into room number 26. Don took my measurements again with my bathing suit bottoms off and my bathing suit top on. When Don asked me about the massage I refused. This was the last time that I saw Don.

Your affiant has read the intelligence reports of the Harris County Organized Crime Control Unit and discovered that the Nasa Bay Motor Inn is reported to be a location where pornographic material is made.

WHEREFORE, PREMISES CONSIDERED, your affiant would respectfully request that a warrant issue authorizing your affiant to forthwith search the above described premises with authority to seize the above described property. Your affiant further requests that the said warrant include a warrant of arrest for the aforesaid Don R. Staines.

/s/ K. R. HENDRICKS
K. R. Hendricks, Affiant

SWORN TO AND SUBSCRIBED before me, on this the 26th day of October, A.D. 1979. 5:10 P.M.

/s/ JOSEPH M. GUARINO
Magistrate, Harris County, Texas

Judge, 183rd District Court
Harris County, Texas

(SEAL)

APPENDIX C

Provisions of the Fourth and Fourteenth Amendments to the United States Constitution.

AMENDMENT [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

APPENDIX D

SUMMARY OF THE SIGNIFICANT EVIDENCE ADDUCED BEFORE THE JURY AT THE GUILT-INNOCENCE PHASE OF TRIAL

The bulk of the State's evidence came from testimony of the three named juvenile (less than 17 years of age) complainants, Tammy Marie Williams, Tracie Ann Gonzales and Sarah L. Hanson (*See* R. I-8).*

Tammy Marie Williams testified (R. IV-9) that she first met Petitioner in December of 1978 (R. IV-11), her mother having been a babysitter for Petitioner's children (R. IV-12). Ms. Williams (the prosecutrix) testified that Petitioner suggested the possibility of her modeling for him for karate magazines (R. IV-12-15). She first went to Petitioner's apartment in January of 1979 (R. IV-15), during which time he first asked her to remove her clothes so he could measure her. After doing so, he had sexual intercourse with her (R. IV-15-19). Thereafter, Petitioner took some pictures of her, fully clothed (R. IV-19). She was paid ten dollars and went home (R. IV-20).

Later in January, Ms. Williams voluntarily returned to Petitioner's apartment and was "measured" again (R. IV-27). She was paid five dollars for being photographed (R. IV-30).

Several months later, she told two schoolmates, Tracie Gonzales and Sarah Hanson (the other two complainants), about her modeling job, although she said nothing about any sexual acts (R. IV-30-32). In April of 1979,

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* References refer to Volume and page number of the record on appeal.

Petitioner asked Ms. Williams to babysit for his children and "work" (R. IV-32-33). Sarah Hanson, who evidently was present, asked to come along and did. (R. IV-32-33). Ms. Williams' testimony reflected that upon arriving at Petitioner's apartment, he measured her as he had before, while Ms. Hanson waited in another room (R. IV-34-35). Later, Ms. Hanson went into the room while Ms. Williams watched television elsewhere (R. IV-36-37). Sarah Hanson testified that (presumably on this same date), she went into the bedroom with Petitioner (R. V-243-46). After asking an assortment of questions, Petitioner requested that she disrobe and, according to her testimony, measured her and subsequently started to unzip his pants. However, Petitioner got dressed when she asked to get dressed and leave (R. V-247-50). Testimony reflected that Petitioner wrote a check to each of them at the conclusion of their visit (R. V-254).

On June 14, 1979, Petitioner again came to pick up Ms. Williams and Ms. Hanson (R. IV-40, V-255). They went to Petitioner's home in Friendswood, Texas (R. IV-47, V-257) for the purpose of modeling in karate suits (R. V-256). Ms. Williams' testimony reflected that she went into Appellant's studio and Petitioner measured her as he had done before (R. IV-43-44). Ms. Hanson also testified that on this date Petitioner took her into his bedroom, measured her and eventually had sexual intercourse with her (R. V-256-61). Later, Petitioner and the two complainants went to his garage where he took fully clothed photographs of them (R. V-264). Petitioner paid each girl (R. V-266).

On approximately July 15, 1982, Petitioner picked up Ms. Williams, Ms. Hanson and complainant Tracie Gon-

zales[1] (R. IV-48-49, V-187). Ms. Williams testified that, after they arrived at Petitioner's house, he took her into a bedroom and measured her as he had done before (R. IV-50-52). Ms. Gonzales testified that, after Ms. Williams emerged from the bedroom she (Ms. Gonzales) went into the bedroom with Petitioner, where he measured her, directed her regarding exercises, gave her a massage, and had sexual intercourse with her (R. V-186-95). Each participant was paid (R. IV-53, V-197). The complainants also testified that they had gone to a motel with Petitioner on another occasion when they were measured and photographed (R. V-199-207, 267-69).

Ms. Hanson and Ms. Williams testified that they were at Petitioner's house again on October 8, 1979 (R. IV-57, V-269). Ms. Hanson testified that she was measured in a manner similar to previous occasions (R. V-269-70). Ms. Williams testified that Petitioner measured her and ultimately had sexual intercourse with her (R. IV-54-61).

Paulette Francis Gonzales, mother of complainant Tracie Gonzales (R. VI-307-08), testified that her daughter told her that Petitioner had "touched her private parts" (R. VI-314) and that there was a meeting with a number of individuals involved with the case (R. VI-315-21). James S. Hanson, father of Complainant Sarah Hanson (R. VI-329-31), testified regarding the initiation of the police investigation (R. VI-331-38) and to the details of his daughter's explanation to him of what she claimed to have occurred (R. VI-338-39).

Petitioner's wife testified in his behalf (R. VI-346, *et seq.*). She testified that Petitioner was a photographer

1. Ms. Gonzales had been there on an earlier date with both of the other complainants (R. V-176-86).

while in the United States Air Force (R. VI-347) and further explained that Petitioner had operated a Karate Studio for two years while they lived in Georgia (R. VI-348). She also testified that Petitioner presently was teaching Karate to children, had written extensively about Karate (R. VI-349-50) and planned to write a book on this subject (R. VI-351). Petitioner's extensive interest in Karate and photography was detailed (R. VI-353-54).

Allen Temperton, manager of the NASA Bay Motor Inn, testified that there was no room number twenty-six (26) at that motel (R. VI-357-58), that being the room number at which some activities were alleged to have occurred according to the testimony of Complainant Tracie Gonzales (R. V-200).

Petitioner's wife was recalled (R. VI-363), at which time she testified that she knew all three complainants and that they had been babysitters, employed by her and Appellant to supervise their children on various occasions (R. VI-363-67). She further testified that complainant Tammy Williams had called on several occasions, asking to babysit or pose for Karate pictures (R. VI-367-68).